# Petition

81-1630

NO.

Office - Supreme Court, U.S.
FILED
MAR 1 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

GAETANO MODICA,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARVEY L. GREENBERG
SCHULMAN AND LAIFER
*Attorneys for Petitioner*
166 Montague Street
Brooklyn, N.Y. 11201
(212) 855-8855

HARVEY L. GREENBERG
*OF COUNSEL*

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302
TEL.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

## QUESTIONS PRESENTED

Whether the trial court committed reversible error by condoning over objection, the summation by the Assistant United States Attorney, that the United States Court of Appeals for the Second Circuit found to be improper in over sixty instances and which included:

1) vouching for the credibility of the Government's witnesses by the prosecution a total of more than sixty (60) times during his summation,

2) arguing to the jury that the Government witnesses had been threatened, when no factual basis whatsoever existed to support such allegations

3) using inflamatory and prejudicial argument, found to be improper by the appellate court below, which included telling the jury that if they acquitted the petitioner he would " . . . walk out of this room laughing at you," and

Whether the trial court improperly denied suppression of the fruits of the warrantless search of an automobile and suitcase contained therein based on a seizure statute although no seizure had occurred.

## PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were petitioner, Gaetano Modica and the United States of America. In addition the United States Attorney for the Southern District of New York filed a memorandum as amicus curiae in support of the petition for rehearing in this matter filed by the United States Attorney for the Eastern District.

## TABLE OF CONTENTS

*Page*

*Questions Presented* ..... *i*

*Table of Authorities* ..... *iii*

*Opinions Below* ..... *1*

*Jurisdictional Statement* ..... *2*

*Constitutional Provisions and Statutes Invoiced*..... *2*

*Preliminary Statement* ..... *2*

*Statement of Facts* ..... *3*

*REASONS FOR GRANTING THE WRIT:*

*I. A Writ of Certiorari should issue to resolve the question of whether, when the trial court refused to take action in the fact of substantial impropriety by the prosecution, a reversal of the conviction should result* ..... *10*

*II. A Writ of Certiorari should issue to resolve the question of whether a warrantless search of an automobile may be made if subject to forfeiture where no seizure of said vehicle occurred and whether a closed suitcase in said vehicle is subject to a warrantless search* ..... *21*

*Conclusion* ..... *25*

**APPENDICES**

Appendix A — Opinion of thge United States Court of Appeals for the Second Circuit and Order Denying Rehearing ..... *1a*

Appendix B — Statutes Involved ..... *29a*

**TABLE OF CASES**

*Page*

*Carrol v. U.S.*, 267 U.S. 132 (1925) ..... *24*

*Chimel v. California*, 399 U.S. 751 (1969) ..... *23*

*Coolidge v. New Hampshire*, 403 U.S. 443 (1971) ..... *22*

*Cooper v. California*, 386 U.S. 58 (1967) ..... *22*

*Gibson v. U.S.*, 403 F.2d 569 (1961) ..... *13*

*Harris v. U.S.*, 402 F.2d 656 (1968) ..... *13*

*Robbins v. California*, 49 U.S.L.W. 4906 ..... *25*

*U.S. v. Bivona*, 487 F.2d 443 (2d Cir. 1973) ..... *11*

*U.S. v. Bruse*, 531 F.2d 396 (5th Cir. 1978) ..... *11*

*U.S. v. Drummond*, 481 F.2d 62 (2d Cir. 1973) ..... *11*

*U.S. v. Farkoff*, 535 F.2d 661 (1st Cir. 1976) ..... *15*

*U.S. v. Francoline*, 367 F.2d 1013 (2nd Cir. 1966) ..... *21*

*U.S. v. Gallagher,* 576 F.2d 1028 (3d Cir. 1978) ..... 11

*U.S. v. Handman,* 447 F.2d 853 (7th Cir. 1971) ..... 12

*U.S. v. Herberman,* 583 F.2d 222 (5th Cir. 1978) ..... 14

*U.S. v. Lameison,* 457 F.2d 371 (5th Cir. 1972) ..... 11

*U.S. v. LaSorsa,* 480 F.2d 522 (2d Cir. 1973) ..... 13

*U.S. v. LaVecchia,* 513 F.2d 1210 (2d Cir. 1975) ..... 21

*U.S. v. Leon,* 534 F.2d 667 (6th Cir. 1976) ..... 15

*U.S. v. McCormack,* 502 F.2d 281 (9th Cir. 1974) ..... 23

*U.S. v. Morris,* 568 F.2d 396 (5th Cir. 1978) ..... 11

*U.S. v. Murphy,* 374 F.2d 651 ..... 12

*U.S. v. Salazar,* 485 F.2d 1272 ..... 15

*U.S. v. Santana,* 485 F.2d 365 (2d Cir. 1973) ..... 11

*U.S. v. Whiley,* 534 F.2d 639 (6th Cir. 1976) ..... 16

*U.S. v. White,* 324 F.2d 814 (2d Cir. 1963) ..... 15

**Statutes:**

Title 21 USC 841 ..... 2

Title 21 USC 846 ..... 2

Title 21 USC 881 ..... 2

**Other Authorities:**

*Vess, Walking a Tightrope, A Survey of Limitations on the Prosecutor's Closing Argument,* 64 J.Crim. L. Criminology, 22, 54-55 (1973) ..... 11

IN THE
# Supreme Court of the United States

OCTOBER TERM, 1981

GAETANO MODICA,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## OPINIONS BELOW

A judgment of conviction was entered in the United States District Court for the Eastern District of New York on December 19, 1980.

Petitioner appealed that decision and the United States Court of Appeals for the Second Circuit affirmed in an opinion dated October 30, 1981. That opinion as yet unreported and a copy is annexed hereto at page 1a of Appendix A. Petitions for rehearing were filed by both petitioner and counsel for the United States of America, which petitions were denied by the Court of Appeals on December 30, 1981. A copy of the unreported opinion is annexed hereto at page 28a of Appendix A).

## JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on December 19, 1980. Petitioner's petition for rehearing was denied on December 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 20.1 of the Rules of this Court.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution.

The Fourteenth Amendment to the United States Constitution.

Title 21 United States Code §841.

Title 21 United States Code §846.

Title 21 United States Code §881.

The pertinent text of the foregoing provisions is set forth in Appendix B at pages 29a-31a.

## PRELIMINARY STATEMENT

Petitioner Gaetano Modica was convicted on October 28, 1980 after a jury trial on charges of attempting to possess (Count One) and possession of a controlled substance (Count Two), in violation of Title 21 United States Code §§841 (a)(1) and 846. On December 19, 1980 a judgment of conviction was entered in petitioner's case in the United States District Court for the Eastern District of New York sentencing him on each count to a term of imprisonment of ten (10) years, and a special parole term of fifteen (15) years, both sentences to run concurrently. Thereafter, petitioner timely filed an appeal to the United States Court of Appeals for the Second Circuit which after

argument resulted in an extensive per curiam opinion on October 30, 1981. Both petitioner and counsel for the United States of America filed petitions for rehearing. In addition to the United States Attorney for the Southern District of New York filed as amicus curiae in the matter. On December 30, 1981 the appellate court below denied all petitions. It did however issue a corrected copy of its opinion deleting the name of the prosecutor involved and adding a sentence to a footnote which explained why the prosecutor was not named.

Petitioner is presently on bail and scheduled to surrender on March 30, 1982.

## STATEMENT OF THE CASE

On October 22, 1979, a suitcase arrived on an Alitalia flight that went unclaimed. A customs inspection of that suitcase revealed nothing. Several days later Alitalia employees, while attempting to ascertain the owner of the bag, discovered five (5) kilograms of heroin contained in a number of plastic bags distributed throughout the suitcase. No real effort had been made to conceal the drugs.

Approximately three weeks later on November 11, 1979, the petitioner, a disabled cook living with his wife and two of his children in Ozone Park, Queens, returned from his yearly trip to Italy. He arrived via Alitalia Flight No. 610 and had with him four baggage tickets, for his luggage on board the same flight. Petitioner submitted that the events that followed, arose out of his attempt to claim two of his bags that were lost by the airline from his November 11, 1979 flight and that he never sought any bag from the October 22, 1979 flight. The bizarre circumstance of a large quantity of valuable heroin being left *unconcealed* in an unmarked suitcase, it was submitted at trial, suggested that the bag was to have been smuggled in by an airport employee, who could circumvent customs.

The prosecution maintained that the smugglers had hoped that the Customs Inspector would miss the one million dollars worth of heroin loosely placed throughout the clothing in the bag when they searched the suitcase and that they then sent Gaetano Modica as a courier to pick up the bag.

The first prosecution witness was the Alitalia employee who first saw the bag, Anthony Vissichio. Mr. Vissichio testified that on October 23, 1979 he was on duty in the Customs Leftover Baggage Room (hereinafter "LOB"), where baggage that had been unclaimed the night before, would be inspected by Customs Inspectors. Mr. Vissichio opened the bags for the Custom Inspector, including the bag in question, (Government Exhibit 3) which was a very common-type large, tan-brown, vinyl, soft-sided suitcase. The bag had no claim ticket markings on it, which was not an uncommon occurrence (216-241, 336-337).* The Customs Inspector ran her hands through the bag and cleared it (247-254, 263-266, 279-292). The bag then was taken to the lost and found area of Alitalia (254-257, 261-263).

The customs inspector testified that normally drugs woule be smuggled in false-sided suitcases, body carried, or concealed within hollowed cargo (292-298).

An Alitalia employee, Peter Finiello, found the heroin while attempting to ascertain the owner of the bag. On October 26, 1979, Finiello opened the suitcase in the Alitalia Lost and Found and started to look for identifying data. As he did so, heroin in plastic bags fell out of the clothing (310-318). Thereafter Customs and the DEA were notified and altogether five kilograms of heroin were seized. (318-321, 358-367, 373-376, 381-386).

The defense contended that at the airport it was common for airport employees to gain access to the "sterile

*Numerical citations are to the transcript of the hearings and trial.

corridors" of customs with illegal keys and smuggle out drugs and other contraband (764) and that Alitalia employees were especially believed to have been involved in this practice at the airport (555-556).[1]

Specifically it was submitted that Joseph Amato, an Alitalia employee, was attempting to retrieve the suitcase with the heroin, which apparently had been lost in transit. Three weeks after this heroin was lost, the petitioner returned from his yearly trip to Italy and learned that two of his four suitcases were missing. When Mr. Modica approached Amato at the central ticket desk to inquire as to the whereabouts of the lost and found, so that he might pick up his missing bags, Amato seized the opportunity to search for the heroin without exposing himself. Joseph Amato, testified that the petitioner without any prior paging (458) walked up to him with a note addressed to "Dear Amato." Amato claimed he did not recognize the name of the signer, "Angelo Morfino," but agreed to help the appellant in any event.[2] Amato admitted this was the first time he had ever seen a letter like this (525),[3] and despite the fact that he didn't know who the writer was Amato began to search the lost and found room ostensibly, according to Amato, to find a suitcase that petitioner had lost when he had returned home from Italy the day before,

---

[1]On cross-examination a government agent testified that this was a prevalent problem at the airport. (764-765)

[2]Gaetano Modica's name was not in the note.

[3]Amato described the meeting as by chance although the note had his name on it. (456-459)

The English translation of the note read as follows: "Dear Amato, The carrier of this paper is my cousin. Who I beg you to put yourself at his disposal. I embrace you dearly. Your colleague Angelo Morfino." (465-466, Government Exhibit 16)

some three weeks after the suitcase with the heroin was found. This was bizarre, since Amato was not assigned to the lost and found, did not belong there, and was ultimately chased away by the employee in charge, Finiello (333-335, 421-422).

Amato also claimed, incredibly, that somehow the petitioner knew about Amato's moonlighting job as a travel agent and without having been told about it by Amato.

On redirect by the prosecution, Amato testified he had been given immunity by the prosecution. The District Court thereafter permitted the prosecution to vigorously impeach Amato thru cross-examination (577-583) and then to prove he had lied about this thru the introduction of extrinsic evidence (736). Such was the prosecution's own view of their witness.

After being driven out of the Lost & Found Amato returned later that evening with Mr. Modica, who had brought his four (4) baggage claim tickets from the November 11, 1979 flight. Amato was holding the tickets and looking at the bags in the Lost and Found again, although that was not his job. Pier Miradoli, who was on duty in the Lost and Found, took over after Amato found one of the petitioner's suitcases. Miradoli ripped the matching tag off the suitcase and after the necessary forms were completed, Amato and the appellant left together (387-397, 422-425). Thereafter, they returned and Amato asked Miradoli to help Modica with another problem. Miradoli claimed Mr. Modica asked for a bag from the crucial October 22, 1979 flight. Although Miradoli had been present after the heroin had been found on October 26, 1979, he testified he had *forgotten* about it and told Mr. Modica the bag was in Rome (398-407).

Miradoli also testified that petitioner had spoken to him, although he could not remember in what language and the employee who discovered the heroin (and is

therefore above suspicion), Finello, indicated that Amato did all the talking and acted as a translator, because of the petitioner's incomprehensible dialect (348-355, 386-387, 418-427).[4] Miradoli also testified he neglected to fill out a missing suitcase report, although that was his responsibility (434).

On November 15, 1979, the Gaetano Modica called Amato at the Dyker Travel Agency and requested that Amato arrange for him to purchase airline tickets to Miami. Later that morning, Mr. Modica met Amato at Dyker and purchased the tickets. Amato testified that the petitioner again mentioned the lost bag and showed Amato a blue piece of paper regarding the bag with the letters "RWUY." Amato testified he did not write down these letters (547-552). Amato further testified that he had trouble understanding what the petitioner said (534-535). The petitioner then gave Amato his home phone number and asked him to call if anything came up (491-508).

At two o'clock that afternoon, Amato reported to work at Alitalia and was met by Agents of the DEA. They took Amato up to their offices. Amato believed himself not free to go and was even escorted to the bathroom. The agents grilled him from two o'clock to eleven o'clock that evening. During that time Amato was given his rights and told he might be arrested (508-510, 519-522, 553-557).

[4] The Casteldaccia dialect spoken by the petitioner was described as almost a separate language and was often not comprehensible to other Italians (418-427).

Eventually the agents had Amato call Gaetano Modica at home to ask him to claim his bag. The first phone call was without result, but at 10:30 P.M., that night Amato spoke with Gaetano Modica and told him that he had received his suitcase, and wanted him to pick it up that night. Despite the prosecution's assertion that the petitioner was anxiously trying to pick up drugs, the petitioner told Amato on the phone that he didn't wish to come that night. Amato insisted and told petitioner that he had to come (510-511, 557-560).

After eleven o'clock Gaetano Modica arrived at the airport, was met by Amato and took the suitcase out to his car. Prior to taking the suitcase, Gaetano Modica asked Amato if he should look inside to make sure it was the right one. Amato told him that it was his bag (512-514, 565-568).

Drug Enforcement Administration agents observed Mr. Modica, one arm hindered by a cast, drag the suitcase out to his car and drive a short distance from the airport to the Richmond Hill section of Queens. There he entered a candy store and purchased cigarettes and then walked a short distance to a pizzeria owned by his three cousins. He stayed there for several hours sitting with family members then reentered his car and drove to his home nearby (44-45, 143, 875-877). The petitioner was arrested as he parked his car in front of his apartment. Mr. Modica consented to a search of his apartment and using his daughter as an interpreter explained to the agents that he had traveled with four suitcases on November 11th, and that the other three suitcases were in one of the bedrooms. The fourth suitcase from that same flight the petitioner believed to be in the trunk of his car. Mr. Modica denied that he had sought any suitcase from any flight other than the one he had arrived on.

The search of petitioner's tiny and modest apartment revealed only his wife, his two children and a baby belonging to another married daughter. No evidence of the narcotics trade at all was found (*i.e.*, scales or dilutents) and a prolonged surveillance showed no attempt to deliver the suitcase to anyone, although with one million dollars worth of heroin, one might expect a transfer of the suitcase or at least several bodyguards at the house.

Moreover, it was uncontested that petitioner tendered four baggage claim tickets from his own flight, and, in fact, claimed one of the two bags, #1808, at the lost and found with Amato present (387-397, 422-425). What was contested was whether, as appellant claimed, he had lost an additional bag from that flight. A search of petitioner's home at the time of his arrest revealed two bags with the claim tickets still on them, numbers 1805 and 1806, that petitioner said he recovered on the day he flew in, a third bag without a ticket which reflected the bag that he recovered from the lost and found (which had had the ticket removed by the lost and found handler on recovery). There were no other suitcases found in the apartment, despite the fact that petitioner had also tendered ticket #1807 and clearly never recovered that bag, confirming petitioner's exculpatory version of the events. The agent admitted he searched high and low for bag 1807 recognizing the significance of its absence (741).

## REASONS FOR GRANTING THE WRIT

### I.

### A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE THE QUESTION OF WHETHER WHEN THE TRIAL COURT REFUSED TO TAKE ACTION IN THE FACE OF SUBSTANTIAL IMPROPRIETY BY THE PROSECUTION A REVERSAL OF THE CONVICTION SHOULD RESULT

In its opinion the United States Court of Appeals for the Second Circuit found that the prosecutor in this case had given a summation that was "indeed improper" and listed extensive instances wherein the prosecutor vouched personally for the credibility of the government's witnesses and the validity of the government's case. The appellate court also found that the prosecutor interjected-ed inflamatory and prejudicial allegations into his summation without basis in fact. Finally, the court below found that the prosecutor told the jury that if they acquitted the petitioner he would "I . . . walk out of this room laughing at you." The court found that "In this case, the only conceivable purpose of the prosecutor's parting shot was to prejudice the jury." (Slip Op. at page 5194). Despite these findings and despite substantial other misconduct during the trial, the Second Circuit declined to reverse finding an absence of substantial prejudice. Petitioner respectfully submits that the only appropriate remedy here was a reversal of the conviction and a new trial, especially where, as here, the trial court condoned the improprieties after objection.

As the United States Court of Appeals for the Second Circuit has recognized in its opinion in this case, the problem of prosecutorial misconduct during summation is a recurring one. It is petitioner's contention that the Circuit

Court's determination of no substantial prejudice was clearly erroneous. In fact, the instant case plainly illustrates the extreme prejudice that may result from improper prosecutorial commentary, particularly as here when no corrective action is taken by the trial court, in response to timely and proper objection.

In determining the lack of substantial prejudice, the Circuit Court employed a three part test which elxamines, (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the certainty of conviction absent the improper statements. See, generally, *Vess, Walking a Tightrope; A Survey of Limitations on the Prosecutor's Closing Argument,* 64 J. Crim. L. Criminology, 22, 54-55 (1973). The petitioner agrees that the above test is an efficient method of determining whether substantial prejudice to a defendant's constitutional rights has occured. The petitioner asserts that the Court was incorrect in its application of the test to the case at bar.

The Second Circuit found three major areas in this case where repeated impropriety occurred. Concerning the first form of misconduct (personally vouching for the credibility of the government's witnesses and case), the Court below stated:

> "This Court has repeatedly warned prosecutors not to vouch for their witnesses' truthfulness, *see, e.g., United States v. Bivona,* 487 F.2d 443, 444-47 (2d Cir. 1973); *United States v. Santana,* 485 F.2d 365, 370-71 (2d Cir. 1973), *cert. denied,* 415 U.S. 931 (1974); *United States v. Drummond,* 481 F.2d 62, 63-64 (2d Cir. 1973); *cf. United States v. Gallagher,* 576 F.2d 1028, 1041-43 (3d Cir. 1978), *cert. dismissed,* 444 U.S. 1040 (1980); *United States v. Morris,* 568 F.2d 396, 400-02 (5th Cir. 1978), and has even reversed a conviction when a prosecutor repeatedly told the jury that certain testimony was true, *see United States v. Burse,* 531 F.2d 1151, 1154-55 (2d Cir. 1976); *cf. United States v. Lamerson,* 457 F.2d 371, 372 (5th Cir. 1972) (per

curiam); *United States v. Handman,* 447 F.2d 853, 856 (17th Cir. 1971).

* * * *

In addition to the instances noted above, the summation was punctuated with excessive use of the personal pronoun "I." More than 60 times in the summation the prosecutor introduced a sentence with "I'm telling you" or "I suggest to you." Occasional use of such rhetorical devices is simply fair argument, *United States v. Murphy,* 374 F.2d 651, 655 (2d Cir.), *cert. denied,* 389 U.S. 836 (1967), but their constant use runs the risk that the jury may think the issue is whether the prosecutor is truthful, instead of whether his evidence is to be believed. A prosecutor should exercise restraint to avoid needless personal references, without sacrificing the vigor or effectiveness of his argument." (at pages 5191-5194).

It is clear that the prosecutor's statements in this regard were an intentional violation of the court's directives as found in earlier cases.

The appellate court next found that the prosecutor had acted entirely improperly by alleging that threats had been made against the government's witnesses without basis in order to bolster his case and explain their apparent lack of veracity.

In his attempt to create a good guys versus bad guys argument, as well as improperly appeal to the basic fears of the jurors, the prosecutor deliberately and persistently characterized various prosecution witnesses, particularly Mr. Amato, as scared, frightened individuals willing to do anything not to be in court as a witness in the trial. Indeed, the Court, by overruling defense counsel's objections, compounded the above by judicially sanctioning these improper comments to the members of the jury.[5]

[5]Although the comments ". . . he looked like he was frozen in his seat. He couldn't move . . ." were not objected to, they appear almost immediately after counsel's prior objection was overruled. (1052-1053).

Although defense counsel indicated to the court that the comments implied that witnesses were threatened without any basis for same in the record, the court rejected counsel's argument noting that "he is not suggesting that the threat comes from the defendant." Assuming arguendo that the court's interpretation is correct,[6] then what is the source of the "threat" the trial court itself acknowledges has been inferred?

Surely, it is not unreasonable to assume, as must have the jurors, that the "threat" inferred by the prosecutor's comments emanated, if not from the defendant, from individuals involved in the narcotics trial, which itself presupposes the defendant's culpability and involvement with them.

As indicated in *U.S. v. Hayward,* 420 F2d 142 (DC Cir, 1969), where there is no support for the claim in the record, it is improper for a prosecutor to imply that weaknesses in his case resulted from intimidation of prospective witnesses.

Compounding the above was the subtle, but direct discrediting of the petitioner's credibility throughout the summation, in contrast to the prosecutor's vouching for the credibility of the prosecution witnesses and thus becoming an unsworn witness on the Government's behalf. *U.S. v. LaSorsa,* 480 F2d 522 (2nd Cir. 1973), cert denied 414 US 855; *Harris v. U.S.,* 402 F.2d 656, 658 (1968); *Gibson v. U.S.,* 403 F2d 569 (1961). Here the prosecutor stated

> ". . . But I'm not here telling you that Mr. Amato is your A-1, Class-1 citizen. *I'm here to tell you that Mr. Amato's*

---

[6]Petitioner still maintains that a fair inference to be drawn from said comments is that the defendant threatened the witnesses. Moreover, Amato had testified he was angry at the government, but not upset by testifying.

*testimony when it relates to the evidence in this case is truthful . . .", (1061)*[1]

in contrast to his later comment that

> *"I suggest to you, as I told you earlier, that indeed Mr. Modica is, in fact, a pretty cool customer. He showed it to you today when he was trying to describe why that $1,400.00 was in his pocket. His demeanor, his conduct on the witness stand, I'm telling you what the man is all about,* because he never told you about that loan on direct . . ." (1096)

Clearly, the above comments placed the prosecutor's own credibility and integrity before the members of the jury, thus becoming an unsworn witness against the defendant.

Inherent in the above is the danger that the prosecutor's opinions may be given undue weight by the jurors by reason of his position as a public official. *U.S. v. Herberman,* 583 F2d 222 (5th Cir., 1978). As such, it is necessary to restrain a prosecutor and demand a high standard of care in a closing argument.

Petitioner contends that such intentional conduct, which goes against the clear warnings contained in precedent, as well as the requirements of the American Bar Association Standards for Criminal Justice are among the most serious type of misconduct.

The prosecutor continued his rampage right into the rebuttal and the trial court continued to refuse to act on the objection of counsel and control the prosecutor. Over objection the prosecutor was permitted to say:

> ". . . don't let Mr. Modica walk out of this room laughing at you . . ."

---

[1]Defense counsel's objection to the comment was overruled.

The Court of Appeals found this to be a "parting shot" whose only conceivable purpose was to "prejudice the jury."

The cases in the circuits have repeatedly held it improper for a prosecutor to express opinions as to the guilt of the defendant. *U.S. v. White,* 324 F2d 814 (2nd Cir., 1963); *U.S. v. Murphy,* 374 F2d 651, cert. denied 389 US 836; *U.S. v. Leeds,* 457 F2d 908 (1972), cert denied 409 US 986; *U.S. v. Salazar,* 485 F2d 1272, cert denied 415 US 985. See also ABA standards, the prosecution function section 5.8(b).

A distinction has been drawn between a prosecutor saying that he believes the evidence shows the defendant's guilt and a prosecutor impermissably declaring his belief in the defendant's guilt. *U.S. v. Morris,* 568 F2d 396, 402 (5th Cir. 1978). In *Morris* the prosecutor asked whether there was any public service in freeing the defendant. In the court's opinion, these comments called for reversal, except for the curative effect of the judge's instructions to the jury at the time. Similarly, it has been held improper for a prosecutor to say "I suggest to you, I ask you to consider these things, come to the decision which I think you should come to based upon the evidence that the defendant is guilty" *U.S. v. Farkoff,* 535 F2d 661 (1st Cir., 1976). If simple overuse of the pronoun "I" creates that requisite prejudice then the prosecutor's comments in this case certainly required reversal.

These remarks were not only an expression of personal confidence in the defendant's guilt but were also an appeal to the base emotions of the jury. It asked them to choose between a guilty verdict or of becoming the objects of ridicule.

In *U.S. v. Leon,* 534 F2d 667, 668 (6th Cir. 1976) the court reversed a conviction where the prosecutor warned the jurors not to be conned. The distinction between warning against being laughed at and being conned is too

ephemeral to be drawn. In another case it was deemed inflammatory when the jury was told that its freeing of a defendant would amount to chalking one up for the criminals. *U.S. v. Whiley,* 534 F2d 659 (6th Cir., 1976).

Prosecutors too often take advantage of their closing remarks to make statements that could more easily be rebutted in another section of the trial. Recognizing that judicial economy restrains appellate courts from ordering reversals after a full trial, prosecutors act with impunity and take advantage of the fact that the cold language of a trial transcript inadequately conveys the effects such statements generally have upon a trial jury.[8]

Petitioner respectfully contends that the inflammatory and highly prejudicial comments made by the prosecutor, compounded by the trial court's failure to sustain counsel's objections and give curative instructions to the jury, require reversal of appellant's conviction.

Moreover, the improper summation here reflected the tenor of the trial.

In his opening, the Assistant United States Attorney over objection speculated on what the defense would be (193) and thereafter delivered a summation in his opening to the jury which ran fourteen pages and in which the prosecutor said over and over "you are going to learn" as he went through each aspect of the case (191-205). The prosecutor finished his opening with the statement,

> "You are going to learn, and I am going to speak to you about it, that Mr. Modica was a man who had a very firm plan in mind and unfortunately for Mr. Modica you are going to learn, that the plan did not work.

---

[8]Similarly the prosecutor threw the entire weight of the government behind its case, when he asked rhetorically "Why is the Federal Government prosecuting him" (1032) in his summation.

At the end of the case, and when I speak with you in summation, I am going to tell you in the Government's view the facts of this case are going to show that Mr. Modica knowingly and intentionally committed every crime that is charged in this indictment." (205)

During the cross-examination of the petitioner, the prosecutor, over objection, asked a series of irrelevant, rhetorical and prejudicial questions. An example of the prosecutor's style in questioning can be seen at page 897,

"Q. You don't drive a Rolls Royce, do you?
A. No.
Q. Would you like to drive a Rolls Royce?" (897)

The prosecutor continued on by asking the appellant to recall the testimony of other witnesses and comment on it (912-914) asking such questions as

"Q. It is hard to believe that bag went through customs, isn't it?
A. I don't know.
Q. Don't you think customs should have found it in the bag?
A. I don't know how they do these things.
Q. It's hard to believe that bag wound up in the lost and found room of Alitalia with over one million dollars worth of heroin in it, isn't it? It's hard to believe?
A. This I don't know.
Q. Well do you think someone planted narcotics in the suitcase?
A. I don't know. (913-914)

Even prior to trial improper actions by the agents and the prosecutors inured to the petitioner's detriment. Thus the case agent, frustrated in his inability to locate the missing fourth bag #1807, in appellant's home, the absence of

which exculpated the Mr. Modica, ripped the remaining tags off the suitcases in the house, making it impossible to conclusively prove that the petitioner had identical bags to the one in question, though made by a different manufacturer (739-741).

Similarly petitioner made extensive discovery motions, which included requests for electronic surveillance and an inventory of destroyed documents. These motions were made on April 8, 1980. Despite repeated requests by defense counsel, no response was made by the prosecution until October 15, 1981 just days before trial, at which time no electronic surveillance was revealed, nor inventory of destroyed tapes shown. During the trial, it emerged that a tape was made and had been lost. The government's own witness indicated the tape was made with the petitioner and that the appellant had stated that he did not wish to come that night to pick up the suitcase, (511) a clearly exculpatory conversation. Over objection the prosecution was allowed to present evidence capitalizing on the loss of the tapes by claiming the conversation was not with appellant at all (708). A jury clearly would have been swayed by hearing appellant's lack of enthusiasm to pick up his bag late at night and the insistance with which Amato pursued the matter. Moreover, the conversation might have revealed Amato referring to the bag from the November 12th flight and not the October 22nd flight.

It is clear that the prosecution's summation was not "minor aberration" but instead reflected the tenor of the trial from its very inception.

Turning to the second portion of the three part test (the measures adopted to cure the misconduct).

It is clear that the trial court made no effort to cure the effects of the improper remarks. Cf. *United States v. Morris*, 568 F.2d 396, 402 (5th Cir. 1978); *United States v. Farnkoff*, 535 F2d 661, 668 (1st Cir. 1976). The judge erroneously overruled petitioners objections and therefore

never utilized the authority at his disposal to minimize the prejudice created by the prosecutors conduct.

The key to the Second Circuits determination that the prosecutors conduct was harmless error seems to lie in its resolution of the final question of the test. The lower court held that the record indicated that the fury would have convicted petitioner even if the improper statements had not been made. In reaching this determination the Court seems to have examined what it perceived as weaknesses in the petitioner's case rather than the evidence presented by the government.

It is submitted that a very experienced prosecutor took an improper course here, because he appeared to be headed for certain defeat.* The prosecution's case against the petitioner was based on several unrealistic and absurd theories, which highlighted the weakness of the case. The appellate court in its opinion described the government's theory of this case as "an unorthodox scheme" to smuggle heroin. It is submitted that the theory propounded by the prosecution was incredible and unbelievable. In essence the prosecution contended that a heroin organization seeking to smuggle in excess of one million dollars worth of heroin (valued at wholesale levels) decided to place the five kilograms of pure heroin unconcealed in an unmarked

---

*The Assistant United States Attorney who tried this case, was one of the office's most experienced, who has clerked on the New York State Court of Appeals and in the Eastern District of New York district court, and who has been a member of the United States Attorneys Office specialized Controlled Substances Conspiracy unit and its sensitive official corruption unit. This was not misspoken words in the heat of battle, but a deliberate and successful attempt o salvage a losing case and it should also be noted that everyone of defense counsel's objections in the summation were overruled by the district court, tying counsel's hands and giving even more credence to the improper arguments, while making defense counsel appear to be making improper and frivolous objections.

suitcase and hope that the customs examination in the left-over baggage room would not come upon it. As unbelievable as this thesis was, the prosecution then asked the jury to further suspend its creduality and believe that this organization then left the bag unclaimed for some three weeks, guaranteeing that an Alitalia employee would carefully search the bag for evidence of ownership. And finally, as the last piece of the puzzle, the prosecution asserted that this sophisticated organization that could procure 1.4 million dollars worth of heroin, sent to pick up the bag the petitioner, a cripple with a cast on one arm, who spoke no English and had trouble communicating in the Italian language (except for a unique dialect) and who was so illiterate that he could not even read the numbers on his baggage claim checks. (533)

Juxtaposed against this Alice-in-Wonderland prosecution theory was a completely credible defense that at the airport it was common for airport employees to gain access to the "sterile corridors" of customs with illegal keys and smuggle out drugs and other contraband and that Alitalia employees were especially believed to have been involved in this practice at the airport.

As detailed in the statement of facts *supra,* the prosecutions major witnesses from the airline Joseph Amato and Pier Miradoli presented testimony that was far from credible and was riddled with inconsistencies.

In summary the prosecution's case consisted of an incredible theory, supported by two major witnesses whose testimony was shown to be less than credible. Considering the gravity of the misconduct involved, the lack of any intervention by the trial court despite counsel's objection, and the overall weaknesses of the prosecutions case, it cannot be said that the misconduct here was harmless error.

## II.

## A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE THE QUESTION OF WHETHER A WARRANTLESS SEARCH OF AN AUTOMOBILE MAY BE MADE IF SUBJECT TO FORFEITURE WHERE NO SEIZURE OF SAID VEHICLE OCCURRED AND WHETHER A CLOSED SUITCASE IN SAID VEHICLE IS SUBJECT TO A WARRANTLESS SEARCH.

At the time of his arrest the petitioner's car was searched without a warrant as was the suitcase that the DEA agents removed from his trunk. The trial court and the Second Circuit upheld the search of the car on the ground that the car could have been seized and forfeited pursuant to 21 U.S.C. §881 and 49 U.S.C. §782. Both courts also upheld the search of the suitcase on the theory that it was a "controlled delivery" and that the petitioner therefore lacked standing to object to the warrantless search of the suitcase. The United States Supreme Court has never spoken with regard to searches of this nature and in fact a split exists in the circuits with regard to the basis for the car search.

Although the facts established and the government conceded that petitioner's car was not seized nor forfeited neither prior nor subsequent to the search, the appellate court relying on *U.S. v. Francolino,* 367 F2d 1013 (2nd Cir 1966) and *U.S. v. LaVecchia,* 513 F2 1210 (2nd Cir. 1975) held that since petitioner's car was subject to forfeiture under Title 21 U.S.C. Section 881, the agents were entitled to search the locked trunk from which the suitcase was retrieved. (T-118, 170)

Appellant respectfully contends that by reason of the trend of decisions of the United States Supreme Court,

this Court's holdings under *Francolino* and *La Vecchia* are no longer valid and should be reversed.

In *Cooper v. California,* 386 U.S. 58 (1967), California police seized a car following an arrest on a narcotics charge pursuant to a state statute authorizing the seizure of any vehicle used in narcotics transactions. One week after the seizure, the car was searched where it was being stored and the evidence seized was introduced at trial.

The Supreme Court upheld the search upon the rationale that it was related to and properly flowed from the seizure that preceded it. *Cooper v. California, supra* pages 61-62.

In *Coolidge v. New Hampshire,* 403 US 443 (1971), the Court noted that

> "In Cooper, the seizure of the petitioner's car was mandated by California statute, and its legality was not questioned. The case stands for the proposition that given an unquestionably legal seizure, there are special circumstances that may validate a subsequent warrantless search." 403 US 461 n. 21.

Accordingly, the legality of the seizure in *Cooper* was left unanswered.

Following *Coolidge,* the Court decided *Almeida-Sanchez v. U.S.,* 413 US 266 (1973), which decision raises doubt as to the legality of the *Cooper* seizure.

In *Almeida,* the sole justification for a warrantless search of an automobile was a federal statute authorizing the search. Noting the per se rule as enunciated in *Katz v. U.S., supra* p. 357, the Court held that a statute cannot justify an otherwise unconstitutional search.

Considering *Cooper* in conjunction with the Court's decisions in *Katz, Coolidge, Almeida-Sanchez* and others, it becomes clear that the power to impound for purposes of forfeiture enjoys no greater breath than the power to

seize for purposes of search. In each case, the government cannot tread upon the citizen's right to privacy and the constitutional protection that insures that privacy.

Contrary to *Francolino* and *LaVecchia,* there should be no unfettered right for the government to seize for purposes of forfeiture under Section 881 without a warrant.

In *U.S. v. McCormick,* 502 F2d 281, (9th Cir. 1974), the Court considered the legality of a seizure for forfeiture without a warrant and rejected same. In *McCormick,* following the defendant's arrest, his car was seized under 49 USC 782, driven to a garage and searched the next day.

The Ninth Circuit overruled the lower Courts refusal to suppress evidence gained from the search. It held that forfeiture statutes create the power to seize only when the facts fall under one of the previously defined exceptions to the Fourth Amendment. The Court found the circumstances of the search be incompatible with the incident to arrest exception, the automobile exception and the plain view exception. The Court further rejected *Francolino's* premise that forfeiture statutes are an exception in themselves and noted that the circuits previous adherence to the rule of *Francolino* was considered mistaken in light of the Supreme Court cases cited in the case at bar.

In the case at bar, the government's claims do not fall within the settled exceptions to the Fourth Amendment. While it has been held that search and seizure is acceptable as an incident of arrest, *Chimel v. California,* 399 U.S. 752 (1969) officers may search only the area within the immediate control of the defendant so as to prevent the acquisition of a hidden weapon or the destruction of reachable evidence. However, in this case the auto was neither seized nor searched immediately proximate to the arrest of the appellant. The appellant had been arrested first, and only after his removal from the area where the car was, did the search occur.

The automobile exception is applicable only when the requirements of probable cause and exigency of circumstances has been satisfied. *Carrol v. U.S.*, 267 US 132 (1925). Since the officers who arrested appellant had already gained possession of his ignition keys and secured the car so that any potential accomplices could easily have been kept away from the car, there existed no exigency sufficient to justify the state's failure to obtain a lawful warrant.[10]

Through the years much judicial attention has been devoted to safeguarding the citizenry from abuse of their Fourth Amendment privileges. All this scrutiny is for nought, if the simple passage of a statute allows the government to create a whole new exception to Fourth Amendment prohibitions. To hold in favor of the government is to invite a plethora of such statutes that are sure to nibble away at the Fourth Amendment, until there is no constitutional prohibition left to save. Instead the better approach is to require that the application of forfeiture statutes comply with previously delineated exceptions to the prohibitive force of the Fourth Amendment. A citizen's right to privacy is certainly impinged upon no less by the random seizure of his property than by random search of it. For this reason, this Court should rule with

---

[10]The record indicates that other than the claimed authority under the forfeiture statute, there existed no other recognized exception to the Fourth Amendment's warrant requirement. Furthermore it should be noted that this Court has never authorized a search merely on the right to possess, but rather each time it addressed this question, it advanced a reason for searching that is closely connected with the government having first obtained actual possession. Under these cases, the search was held to be reasonable because it was part of the governmental responsibility for the items in its possession. Accordingly, absent a seizure and its attendant possession there is no governmental responsibility and therefore the reason for the search no longer exists.

the Ninth Circuit in reconsidering the implications of *Francolino* in light of recent Supreme Court declarations.

Finally it is clear under *Robbins v. California,* 49 U.S.L.W. 4906, (U.S. July 1, 1981) (plurality opinion) that "a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." The petitioner was given the suitcase by the airport employee and told that it was his own, he therefore was lawfully in possession and a reasonable expectation of privacy existed as to the suitcase. The "controlled delivery" theory has not been spoken to by this Court and it is submitted that under *Robbins* the fruits of the search should have been suppressed.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Brooklyn, New York
March 1, 1982

Respectfully submitted,

HARVEY L. GREENBERG
SCHULMAN AND LAIFER, ESQS
*Attorneys for Petitioner*
166 Montague Street
Brooklyn, New York 11201
(212) 855-8855

HARVEY L. GREENBERG
*Of Counsel*

# Appendix

## APPENDIX A

**Opinion of the United States Court of Appeals for the Second Circuit and Order Denying Rehearing**

[SECOND CORRECTED COPY]
UNITED STATES COURT OF APPEALS
For the Second Circuit

---

No. 1025—September Term 1980
(Argued: April 7, 1981 Decided: October 30, 1981)
Docket No. 80-1482

---

UNITED STATES OF AMERICA,

*Appellee,*

-against-

GAETANO MODICA,

*Appellant.*

---

Before:

TIMBERS and NEWMAN, *Circuit Judges,*
and SOFAER, *District Judge.**

---

Appeal from judgment of conviction for possession of heroin in violation of 21 U.S.C. §§841(a)(1), 846, entered by United States District Court for the Eastern District of New York (Nickerson, J.). *Held:* automobile search did not violate Fourth Amendment; improper pro

---

*Honorable Abraham D. Sofaer, United States District Judge, Southern District of New York, sitting by designation.

secution summation did not deprive appellant of fair trial. Conviction *affirmed.*

---

*BARRY E. SCHULMAN, Brooklyn, N.Y. (Edwin I. Schulman and Schulman & Laifer, of Counsel), for appellant.*

WILLIAM J. CUNNINGHAM, III, Brooklyn, N.Y. (Edward R. Korman, United States Attorney, Jane Simkin Smith, Assistant United States Attorney, Eastern District of New York, of Counsel), *for appellee.*

---

*Per Curiam:*

This appeal—like far too many reaching this Court—centers on improper statements made by a prosecutor in his summation to a jury. Such misconduct has gone largely unremedied, for appellate courts are understandably reluctant to reverse convictions merely to discipline prosecutors. This case, too, is one in which the prosecutor's improper remarks do not warrant reversal of the conviction. The time has come, however, to explore possible sanctions for prosecutorial misconduct other than reversing convictions. We believe that alternative sanctions can and should be fashioned, and that an exploration of their use may prove to be more effective than the unheeded condemnations expressed in prior opinions.

## I. *The Crime Alleged*

Appellant's indictment grew out of an unorthodox scheme to smuggle five kilograms of heroin into the

United States through John F. Kennedy International Airport. On October 22, 1979, a brown, soft-sided, zippered suitcase arrived at the airport on an Alitalia Airlines flight from Rome. The suitcase carried no personal identification tag and no baggage claim-check; the only identifying feature was the brandmark "Airway." No one claimed the suitcase, and it was placed in the Alitalia section of the leftover baggage room at the airport, an area controlled by the United States Customs Service. On October 23, an Alitalia employee presented the suitcase to a customs agent; the agent examined the bag cursorily, found nothing, and cleared it. The bag was then moved to Alitalia lost-and-found room. Later that day, another Alitalia employee, Finiello, searched the suitcase in order to identify and locate its owner. As he searched, two plastic bags fell out of a coat in the suitcase. Finiello correctly suspected that the bags contained heroin, and he so advised another employee in the lost-and-found room, Miradoli, as well as the area supervisor. The Alitalia employees returned the suitcase to the left-over baggage room, where a customs inspector examined it and discovered three additional bags of heroin. In all, the suitcase contained five kilograms of heroin, with a wholesale value of $1.4 million.

The parties disagree as to what transpired between the time that the heroin was discovered and November 15, when appellant Gaetano Modica claimed the suitcase. The prosecution's account is that the suitcase remained unclaimed for about two weeks. Then, on the afternoon of November 12, appellant went to the Alitalia information desk at the airport and contacted an employee named Amato. Appellant gave Amato a note, dated November 1979, and written in Italian on Alitalia stationery. The note was from Morlino, an Alitalia employee apparently stationed in Palermo, Italy. The note asked Amato to assist Morlino's cousin, the bearer of the note. Appellant

told Amato that he had arrived on an Alitalia flight from Rome on the previous day and had lost a suitcase. Amato accompanied appellant to the lost-and-found room to search for the bag, but Finiello told them that appellant would need to bring his baggage claim-check, and they left.

On the evening of November 12, appellant and Amato returned to the lost-and-found room. Appellant brought four baggage claim-checks. Miradoli, who had been present with Finiello on appellant's earlier visit, located a bag that matched one of the claim checks. Appellant signed for the bag and then left the room with Amato. Shortly thereafter, they returned, and Amato asked Miradoli to assist appellant on another problem. Amato then left the room, and appellant told Miradoli that he was looking for another bag—a brown, soft-sided, zippered suitcase. He claimed that his aunt had arrived on an October 22 Alitalia flight, but had been too ill to claim the suitcase. Miradoli ascertained from the baggage records that two bags that had arrived on October 22 — one black and one brown — had gone unclaimed. He mistakenly told appellant that the brown bag had been returned to Alitalia's lost-and-found department in Rome. Appellant then left the room. Later that day, however, Miradoli rechecked the records and discovered that the brown suitcase had not been returned to Rome; he then realized that appellant was looking for the suitcase that contained the heroin.

On November 15, appellant visited Amato at a travel agency for which Amato moonlighted; appellant had asked for Amato's business card on the twelfth and said that he might purchase airline tickets from Amato there. On the fifteenth, appellant did indeed purchase several tickets from Amato. Appellant again asked for help in locating the brown suitcase from the October 22 flight, and he said

that he had determined that the bag had not been returned to Rome. (At trial, Amato was unable to recall the details of this conversation, and the prosecution introduced portions of his grand jury testimony.) Appellant described the suitcase as light brown and carrying no claim check. Appellant handed Amato a note on blue paper with "RWUY" written on it to describe the brandmark on the suitcase; Amato interpreted those letters to be a phonetic approximation of "Airway." Appellant told Amato that the suitcase contained something valuable and that someone might get in trouble if the bag were not found; he gave Amato his home telephone number and left.

When Amato arrived at work in the Alitalia terminal later that day, he was interviewed by Drug Enforcement Administration ("DEA") agents as a suspect in their investigation of the October 22 suitcase. After recounting his conversation with appellant, Amato was directed to phone appellant and inform him that his suitcase had been found.[1] Appellant returned Amato's call at 10:30 p.m., and Amato told him to come and claim the suitcase that evening. Appellant arrived around 11:00 p.m., and Amato led him to the hallway outside the lost-and-found room. DEA agents had lined up a half-dozen suitcases there; appellant looked the bags over, chose the October 22 suitcase, and departed with it. Under extensive surveillance, appellant drove to a restaurant and, after about two hours, returned to his home . DEA agents there arrested him and seized the suitcase from the trunk of his car.

The prosecution's theory of the crime was that appellant, working with confederates in Italy, had concocted this unusual scheme to smuggle the heroin past the customs agents. The perpetrators had deliberately removed all identification from the bag, hoping for a cursory inspection in the left-over baggage room. As soon as appellant arrived from Italy, he began his efforts to obtain the suitcase.

Appellant's defense was in essence that he had been framed by Amato. Appellant contended that Amato, probably in conjunction with other Alitalia employees, had planned to smuggle in the suitcase. When the heroin was discovered and Amato interrogated as a suspect, he needed to shift the blame onto someone else, and appellant unfortunately happened along at that time. Appellant was not seeking a suitcase from an October 22 flight, but rather was seeking a second lost bag from his November 11 flight. When Amato called appellant on November 15, he told appellant that he had located that second suitcase. At the airport, appellant claimed, Amato pointed to the suitcase and told appellant that he need not examine it because it was his. Thus, appellant unwittingly claimed the suitcase pursuant to Amato's scheme.

Appellant was indicted on three counts: attempting to possess with intent to distribute five kilograms of heroin, 21 U.S.C. §§841(a)(1), 846; possessing with intent to distribute thirty grams of heroin, 21 U.S.C. §841(a)(1); and importing five kilograms of heroin into the United States, 21 U.S.C. §§952(a), 960(a)(1). On October 28, 1980, the jury convicted appellant of the first two counts and acquitted him of the third. The trial court sentenced appellant to ten years imprisonment and fifteen years special parole on each of the two counts, the sentences to run concurrently.

## II. *The Warrantless Search*

When the DEA agents arrested appellant in front of his house, they conducted a wearrantless search of the trunk of h is automobile and found the suitcase. Appellant moved below to suppress the suitcase, on the ground that the agents needed a warrant to enter the trunk. The district court properly denied appellant's motion. The agents knew that the automobile was carrying heroin, and they therefore had probable cause to believe that the

automobile could be seized and forfeited pursuant to 49 U.S.C. §782 and 21 U.S.C. §881.[2] They were entitled to search the trunk without a warrant even though they did not seize the automobile. *United States v. Panebianco,* 543 F.2d 447, 456 (2d Cir. 1976), *cert. denied,* 429 U.S. 1103 (1977); *United States v. LaVecchia,* 513 F.2d 1210, 1215-17 (2d Cir. 1975); *United States v. Francolino,* 367 F.2d 1013, 1018-22 (2d Cir. 1966), *cert. denied,* 386 U.S. 960 (1967).

The search of the suitcase itself, in contrast to the search of the trunk, was a minor issue below. *See* Transcript at 17-30, 163-71. Although it is unclear whether appellant objected to this search, the trial judge indicated that the suitcase, once taken from the trunk, was properly searched under the "controlled delivery" theory of *United States v. Bulgier,* 618 F.2d 472 (7th Cir.), *cert. denied,* 101 S.Ct. 125 (1980), and *United States v. Andrews,* 618 F.2d 646 (10th Cir.), *cert. denied,* 101 S.Ct. 84 (1980). Those cases hold that, after private airline employees discover narcotics in a package and turn it over to the police, the police may make a controlled delivery of the package to the intended recipient and then search it without a warrant. The trial judge properly applied those cases here to uphold the search. *See United States v. DeBerry,* 487 F.2d 448, 450-51 (2d Cir. 1973).

On appeal, appellant has not pressed his objection to the search of the suitcase. Subsequent to the argument of this case, however, the Supreme Court ruled that "a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else." *Robbins v. California,* 49 U.S.L.W. 4906, 4907 (U.S. July 1, 1981) (plurality opinion). Although the search of the suitcase here was supported by the strongest probable cause imaginable (*i.e.,* the agents knew that the suitcase contained heroin because they had placed it there), the Supreme

Court appears to have ruled that the existence of probable cause cannot excuse the need for a wearrant. *Id.* at 4906.

Nevertheless, *Robbins* does not require suppression of the contents of the suitcase hre. As a threshold matter, appellant lacks standing to object to the search of the bag. Appellant has insisted throughout the trial and the appeal that the suitcase is not his and that he was duped into claiming it. By his own admission, therefore, appellant could not have had any expectation of privacy as to the suitcase's contents. Thus, even if the search was illegal, it did not violate appellant's Fourth Amendment rights. *See Rawlings v. Kentucky,* 100 S. Ct. 2556, 2561-62 (1980); *United States v. Salvucci,* 100 S. Ct. 2547, 2552-55 (1980); *Rakas v. Illinois,* 439 U.S. 128, 133-40 (1978); *United States v. Goshorn,* 628 F.2d 697, 699-701 (1st Cir. 1980).

The rationale of *Robbins,* moreover, is inapplicable to this case. In *Robbins,* the warrantless search of the luggage compartment was permissible under the "automobile exception"; but the Court held that the two factors underlying that exception—the inherent mobility of an automobile and the diminished expectation of privacy that surrounds it—do not justify warrantless searches of closed containers inside the automobile. 49 U.S.L.W. at 4907. Here, by contrast, the warrantless search of appellant's automobile was permissible because the car was subject to statutory forfeiture. Once the automobile was seized, appellant lost any expectation of privacy, at least as to the very article contained in the car that justified the forfeiture. *Cf. United States v. Zaicek,* 519 F.2d 412, 414-15 (2d Cir. 1975) (reversing suppression of contents of attache case found in trunk; search was permissible because car was properly seized). In fact, the heroin and the suitcase were themselves subject to forfeiture as a controlled substance and its container, and therefore "no property right . . . exist[ed] in them." 21 U.S.C. §881(a)(1),

(3); *see United States v. Ledesma,* 499 F.2d 36, 39-40 (9th Cir.), *3cert. denied,* 419 U.S. 1024 (1974).

Finally, even if *Robbins* weere construed or extended to reach the situation presented here, appellant would not be entitled to reversal. *Robbins* would likely not be applied retroactively to require suppression of evidence where probable cause for the search existed. Its application here would have no deterrent value, but only demoralizing effect. *See generally United States v. Peltier,* 422 U.S. 531, 535-39 (1975); *United States v. Reda,* 563 F.2d 510, 511-12 (2d Cir. 1977), *cert. denied,* 435 U.S. 973 (1978). Moreover, any error in admitting the contents of the suitcase was harmless: appellant conceded that he had claimed the suitcase in question; the suitcase itself was properly lseized from the trunk of his car; and the agents and airline personnel involved testified without contravention that the suitcase seized was the same one that appellant had claimed, in which the heroin had been found, and in which a heroin exemplar had been left. Modica would therefore have been proved to have possessed heroin even if the heroin left in the suitcase had not been introduced. *Cf. United States v. Cirillo,* 499 F.2d 872, 888 (2d Cir.), *cert. denied,* 419 U.S. 1056 (1974) (affirming heroin conviction despite absence of direct proof that paper bag contained heroin; "There was ample circumstantial evidence that the bag contained heroin.").

IOII. *The Claim of Prosecutorial Misconduct*

The central thrust of this appeal is that the prosecutor's improper statements in summation deprived appellant of a fair trial.[3] His summation was indeed improper in several respects. Nevertheless, the summation did not deprive Modica of a fair trial.

### A. *The Improper Comments*

The first impropriety committed by the prosecutor was in vouching for Amato's veracity. In his summation, the prosecutor reviewed Amato's involvement in the case, and his testimony, at length. Recognizing that Amato's performance on the witness stand had been poor, the prosecutor argued for Amato's credibility. Initially, the prosecutor shied away from an outright endorsement, employing insteads the rhetorical device "I suggest that".

> I suggest to you that Mr. Amato in part was a very truthful witness. There were parts that he wasn't truthful. I suggest to you he backed off things that he very clearly said to the grand jury about his conversation with Mr. Modica at Dyker Travel.

Transcript at 1056. A few moments later, the prosecutor conceded that it had been improper for Amato, as an airline employee, to moonlight as a travel agent. Then he continued:

> But I'm not here telling you that Mr. Amato is your A-1, Class-1 citizen. I'm here to tell you that Mr. Amato's testimony when it relates to the evidence in this case is truthful.

*Id.* at 1061. Appellant objected, but the judge overruled the objection.

The "I'm here to tell you" comment was improper. The American Bar Association Standards for Criminal Justice declare: "It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or guilt of the defendant." ABA Standards for Criminal Justice, Standard 3-5.8(b) (1980)l [hereinafter cited as "ABA Standard (number)"]. The policies underlying this proscription

go to the heart of a fair trial. The prosecutor is cloaked with the authority of the United States Government; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, but rather of a federal official duty-bound to see that justice is done. The jury knows that he has prepared and presented the case and that he has complete access to the facts uncovered in the government's investigation. Thus, when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore h is views, however biased and baseless they may in fact be. *See Berger v. United States,* 295 U.S. 78, 88 (1934). Personal expressions of opinion are especially improper if phrased to leave the impression that the prosecutor's opinion is based on matters in the investigative file and not in the trial eviden ce. *United States v. Lamerson,* 457 F.2d 371, 372 (5th Cir. 1972) (per curiam); *McMillian v. United States,* 363 F.2d 165, 169 (5th Cir. 1966).

This Court has repeatedly warned prosecutors not to vouch for their witnesses' truthfullness, *see e.g., United States v. Bivona,* 487 F.2d 443, 444-47 (2d Cir. 1973); *United States v. Santana,* 485 F.2d 365, 370-71 (2d Cir. 1973), *cert. denied,* 415 U.S. 931 (1974); *United States v. Dru nmond,* 481 F.2d 62, 63-64 (2d Cir. 1973); *cf. United States v. Gallagher,* 576 F.2d 1028, 1041-43 (3d Cir. 1978), *cert. dismissed,* 444 U.S. 1040 (1980); *United States v. Morris,* 568 F.2d 396, 400-02 (5th Cir. 1978), and has even reversed a conviction when a prosecutor repeatedly told the jury that certain testimony was true, *see United States v. Burse,* 531 F.2d 1151, 1154-55 (2d Cir. 1976); *cf. United States v. Lamerson,* 457 F.2d 371, 372 (5th Cir. 1972) (per curiam); *United States v. Handman,* 447 F.2d 853, 856 (7th Cir. 1971). Recently, this Court cited the ABA Standard quoted above and declared: "All prosecutors in this circuit should be guided by this rule in the future." *United*

*States v. Sprayregan,* 577 F.2d 173, 174 n.2 (2d Cir.), *cert. denied,* 439 U.S. 979 (1978).

The trial court erred in overruling appellant's objection. The judge should have stricken the remark and immediately instructed the jurors to the effect that they could consider no evidence other than that presented to them; that the prosecutor was an advocate, not a sworn witness; and that they must treat the prosecutor's assertion as to the witness's veracity as non-evidentiary argument that they were free to reject.

A second improper statement by the prosecutor was closely related to his vouching for Amato's credibility. The prosecutor several times characterized witnesses, particularly Amato, as being "scared," apparently in order to explain their reticence and inconsistency. Defense counsel promptly objected to this characterization, concerned that the comments would suggest to the jury that Amato had been threatened for testifying against appellant. The trial judge initially refused to permit defense counsel to approach the bench, simply overruling his objections. Transcript at 1052-55. Apparently concerned that the jury might miss his point, the prosecutor then expressly suggested that Amato's fear was related to a mysterious third person who had accompanied appellant when he arrived at the airport to claim the missing suitcase:

> You heard Mr. Amato state that the defendant, Mr. Modica had someone else with him at the time. You heard Mr. Miradoli say that, too. You heard Mr. Costanzo, who testified today, say that, too. There is only one person who didn't say that—Mr. Modica. And when these witnesses—

again, talking about Mr. Miradoli, Mr. Costanzo, Mr. Amato, when they were asked about this other person, did you see their reaction? Did they look like they were anxious, that they were trying to describe them? What did their faces look like? They were scared. I am telling you —.

Transcript at 1068.

Defense counsel objected. At the bench, he argued that the prosecutor was suggesting that the "witnesses were scared" and that "[t]here isn't any hint of a threat in this case." *Id.* The trial judge responded: "He [the prosecutor] is not suggesting that the threat comes from the defendant." *Id.* at 1068-69. Defense counsel said "I think that's a pretty clear implication," but the judge disagreed. *Id.* at 1069. Yet the testimony described the third person as having accompanied appellant, and Amato's alleged fear related to his testifying against appellant. The statement seems to have been designed to explain Amato's testimonial inadequacies by associating appellant with an unknown and threatening individual.

The trial judge should have sustained the objection and taken corrective action. A prosecutor is free to comment upon the evidence, including demeanor. But he may not use the presence of an unknown individual, concerning whom no evidence was introduced, as a vehicle for suggesting that the defendant is associated with threatening people. *See, e.g., United States v. Rios,* 611 F.2d 1335, 1342-43 (10th Cir. 1979); *United States v. Peak,* 498 F.2d 1337, 1339 (6th Cir. 1974); *United States v. Hayward,* 420 F.2d 142, 146-47 (D.C. Cir. 1969); *Hall v. United States,* 419 F.2d 582, 585 (5th Cir. 1969). Such a suggestion has a special potential for prejudice, moreover, when it is made by a prosecutor, who the jury may well think knows something about the defendant's mysterious associate that cannot be revealed, and who at the same time vouches for the truthfulness of the frightened witness's testimony.

A third impropriety occurred in the prosecutor's rebuttal summation. He closed his argument by saying:

> I submit to you that the Government has proven the proof. It has proven the charges in this case beyond every doubt.

> The proof is very clear. Don't let Mr. Modica walk out of this room laughing at you.

Transcript at 1164-65. Appellant's objection was overruled. *Id.* at 1165.

The apposite ABA Standard states a fundamental principle: "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." ABA Standard 3-5.8(c). *Cf. United States v. Hayward, supra,* 420 F.2d at 146 ("It is fundamental to sound procedure in federal criminal prosecutions that counsel refrain from 'appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only [be] to arouse passion and prejudice.' ") (quoting *Viereck v. United States,* 318 U.S. 236, 247 (1943)). No trial—civil or criminal—should be decided upon the basis of the jurors' emotions. But the stricture against prejudicial appeals to the jury is most compelling with respect to the performance of a prosecutor, for the reasons given by the Supreme Court in *Berger v. United States, supra:*

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. at 88. In this case, the only conceivable purpose of the prosecutor's parting shot was to prejudice the jury. The observations of the Court of Appeals for the Fifth Circuit, with respect to a prosecutor's closing reference to a defendant as a "hoodlum," are applicable to the prosecutor's remarks here:

> This type of shorthand characterization of an accused, not based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of grey facts it starkly rises—succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government.

*Hall v. United States, supra,* 419 F.2d at 587. The government does not deny in its brief that the comment was improper.

Here, again, defense counsel objected, but was overruled. The judge should immediately have charged the jurors that they were not to consider anyone's reaction—the prosecutor's or the defendant's—to their verdict, and that the only issue before them was whether the prosecution had proven its case.

In addition to the instances noted above, the summation was punctuated with excessive use of the personal pronoun "I." More than 60 times in the summation the prosecutor introduced a sentence with "I'm telling you" or "I suggest to you." Occasional use of such rhetorical devices is simply fair argument, *United States v. Murphy,* 374 F.2d 651, 655 (2d Cir.), *cert. denied,* 389 U.S. 836 (1967), but their constant use runs the risk that the jury may think the issue is whether the prosecutor is truthful, instead of whether his evidence is to be believed. A prosecutor should exercise restraint to avoid needless personal references, without sacrificing the vigor or effectiveness of his argument.

In sum, the prosecutor made a number of clearly improper remarks throughout his summation, and the district court should have sustained appellant's objections to those comments.

*B. The Absence of Substantial Prejudice*

Appellant asserts that the cumulative effect of the improper statements was to deny him a fair trial. A prosecutor's improper summation results in a denial of due process when the improper statements cause substantial prejudice to the defendant. *See, e.g., United States v. Bivona, supra,* 487 F.2d at 444; *United States v. White,* 486 F.2d 204, 205 (2d Cir. 1973), *cert. denied,* 415 U.S. 980 (1974); *cf. United States v. Morris, supra,* 568 F.2d at 402. Often, the existence of substantial prejudice turns upon the strength of the government's case: if proof of guilt is strong, then the prejudicial effect of the comments tends to be deemed insubstantial; if proof of guilt is weak, then improper statements are more likely to result in reversal. *Compare United States v. Gallagher, supra,* 576 F.2d at 1042-43 *and United States v. Benter,* 457 F.2d 1174, 1178 (2d Cir.), *cert. denied,* 409 U.S. 842 (1972) *with Berger v. United States, supra,* 295 U.S. at 88-89 and *United States v. Burse, supra,* 531 F.2d at 1155. More comprehensively, however, determining the existence of substantial prejudice involves three factors: the severity of the misconduct; the measures adopted to cure the misconduct; and the certainty of conviction absent the improper statements. *See generally* Vess, *Walking a Tightrope; A Survey of Limitations on the Prosecutor's Closing Argument,* 64 J. Crim. L. & Criminology 22, 54-55 (1973).

The first question is whether the improper comments were "minor aberrations in a prolonged trial" or "cumulative evidence of a proceeding dominated by passion and prejudice". *United States v. Socony-Vacuum Oil*

*Co.*, 310 U.S. 150, 240 (1940); *see, e.g., United States v. Sprayregen, supra,* 577 F.2d at 175; *United States v. Wilner,* 523 F.2d 68, 73-74 (2d Cir. 1975). Among the elements weighed in this inquiry are the extent to which the misconduct was intentional and the extent to which the statements were made in response to defense contentions. Here, the prosecutor's offending behavior was confined to his summation: his opening statement and his conduct throughout the six-day trial were free of improper remarks. This was not a trial marked by passion and prejudice. At no time did the prosecutor disregard any rulings of the trial court; in fact, the prosecutor changed the gist of his argument as to why Amato was scared, immediately after the trial judge had overruled the objection to his initial comment.[4]

The trial court made no effort to cure the effects of the improper remarks. *Cf. United States v. Morris, supra,* 568 F.2d at 402; *United States v. Farnkoff,* 535 F.2d 661, 668 (1st Cir. 1976). The judge erroneously overruled appellant's objections and therefore never utilized the authority at his disposal to minimize any prejudice—for example, by ordering the remarks stricken or issuing cautionary instructions. The court's pattern instruction to the jury—that the arguments of counsel are not to be considered evidence—was proper, but was an insufficient response to the proecutor's conduct.

Nevertheless, the trial record strongly indicates that the jury would have convicted appellant even if the improper statements had not been made. The case against appellant was overwhelming; he was caught red-handed, and his explanation was implausible and refuted.

Numerous witnesses—other than Amato—flatly contradicted appellant on facts critical to his claim that he was an innocent bystander framed by Amato. An Alitalia employee, Costanzo, testified that appellant had approached him on the afternoon of November 12 looking

for Amato; appellant claimed that he had never seen or spoken with Costanzo and that his meeting Amato had been fortuitous. Appellant claimed that he was looking for a second lost suitcase from his November 11 flight; Miraldoli testified that appellant had asked him on November 12 (after Amato had left the lost-and-found room) to help locate a bag left by his aunt from the October 22 flight. Appellant claimed that, on the night of November 12, Amato had pointed to the suspect suitcase as the one to select; DEA agent Mella, stationed down the hallway, denied that Amato had pointed. These contradictions, by witnesses other than Amato, undermined appellant's credibility and his defense.[5]

Appellant's story was so inherently implausible, moreover, that it is unlikely that the jury would have accepted it. His claim that the note that he handed to Amato with the letters "RWUY" referred to a cleaner named "Rightaway," and not to the luggage brandmark "Airway," was incredible. Similarly, appellant's assertion that he took the suitcase without opening it to see if it was his, because he could always bring it back, made no sense. Above all, the unlikely claims of coincidence—that appellant had happened along just as Amato was looking for someone to frame; that he had lost a bag just like the one containing the heroin—strained belief, particularly in light of the contradictions of appellant by sundry witnesses.

In sum, the prosecutor's remarks, although improper and uncorrected, did not result in substantial prejudice to appellant or deprive him of a fair trial. His summation remarks were the only improper behavior that occurred, and the case against appellant was so strong that the jury in all probability would have found him guilty even absent the improper comments.

*IV. Alternative Sanctions for Prosecutorial Misconduct*

We thus find ourselves in a situation with which this Court is all too familiar: a prosecutor has delivered an improper summation, despite this Court's oft-expressed concern over the frequency with which improper prosecution summations occur. *See, e.g., United States v. Sprayregen, supra,* 577 F.2d at 174; *United States v. White, supra,* 486 F.2d at 206 & n.4. *See generally* Note, *Prosecutorial Misconduct—Recent Second Circuit Cases,* 2 Hofstra L. Rev. 385 (1974); Annot., 41 A.L.R. Fed. 10 (1979). Yet, just as this Court has often brandished the sword of reversal only to resheath it in the absence of substantial prejudice, here, too, we find no basis to reverse the underlying conviction.

Instead of reversing, this Court (like others) has often issued warnings. We hesitate to conclude that prior warnings have been ineffectual; improper summations might be far more frequent but for this Court's searching review of trial records. One can safely say, however, that warnings alone have proved insufficient. This Court, in particular, has repeatedly expressed frustration at the regular appearance on its docket of cases in which prosecutors have delivered improper summations. For example, in reviewing another conviction, the Court observed:

> We are reminded in summation cases that repeated rebukes of the prosecution by an appellate court without reversal may ultimately become "an attitude of helpless piety," and our "deprecatory words . . . purely ceremonial." . . . We trust that the rebukes in *United States v. Isaza,* [453 F.2d 1259 (2d Cir. 1972,] and here, however, will not go unheeded by the prosecutorial staff involved for another time the evidence of guilt may be less convincing and the likelihood of prejudicial error correspondingly higher.

*United States v. Benter, supra,* 457 F.2d at 1178 (citations omitted). That warning was reiterated in *United States v. Bivona, supra,* in which the Court threatened to reverse convictions even absent substantial prejudice:

> Although we conclude that reversal is not required here, we cannot ignore the numerous departures from approved prosecutorial advocacy which have been called to our attention within the last six months. Thus, we have considered whether the dramatic step of upsetting a conviction is the only way to deter future prosecutorial misconduct. . . . [U]nless the prosecutor heeds our recent warnings, we may be left with no alternative but to reverse convictions where the argument of the prosecution goes beyond what is permissible and fair. But, we fully expect that our criticism . . . will not fall on deaf ears.

487 F.2d at 447 (citations omitted). Other courts have issued similar warnings. *See, e.g., United States v. Farnkoff, supra,* 535 F.2d at 668 n.17; *United States v. Freeman,* 514 F.2d 1314, 1321 (D.C. Cir. 1975), *vacated per curiam on other grounds,* 598 F.2d 306 (D.C. Cir. 1979); *United States v. Harris,* 402 F.2d 656, 659 (D.C. Cir. 1968).

Despite numerous threats to reverse convictions for prosecutorial misconduct, federal courts have seldom invoked that sanction. This Court, in fact, has only in rare and peculiar cases reversed a criminal conviction because of an improper summation, absent substantial prejudice. *See United States v. Drummond,* 481 F.2d 62 (2d Cir. 1973) (third recent appeal involving improper summations by same prosecutor).

Given this Court's unwillingness to use reversals as a means of disciplining prosecutors, threats to do so seem unlikely to have much effect. As a practical matter, prosecutors know that courts are reluctant to overturn convictions because of improper remarks, when the defendant's

guilt is clear. One commentator has summed up the way in which threats of reversal are perceived:

> Academic commentators have generally despaired of appellate reversal as an effective means of controlling prosecutorial misconduct. They have referred to reversal as a "quasi-sanction" and have said, "Appellate justices time and again have condemned . . . poor conduct and warned prosecutors to keep within the bounds of propriety. Later opinions reflect the result—frustrating failure." These academic observers have found it imperative that "two distinct problems—justice and discipline—be kept separate."

Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges,* 50 Tex. L. Rev. 629, 645 (1972) footnotes omitted). *See* Note, *Prosecutor Indiscretion: A Result of Political Influence,* 34 Ind. L.J. 477, 487 (1959) ("The appellate tribunals have found to their dismay that they cannot uphold a conviction and yet successfully condemn the method by which it was secured. Carefully written opinions condemning the indiscretion and misconduct have not been successful to curb improprieties. The very act of upholding the conviction has given prosecutors approval, and the 'judicial slap on the wrist' has not deterred the prosecutor from his unethical and improper tactics." (footnotes omitted)).

We share the frustration voiced by commentators at the inability of some federal prosecutors to abide by well-established rules limiting the types of comments permissible in summation. But we disagree that the solution lies in reversing valid convictions. Ordering a new trial remains among the measures that the Court may apply in a particular case, and we believe that its availability has some deterrent effect. But its invocation is properly shunned when the misconduct has not substantially prejudiced a defendant's trial. Reversal is an ill-suited remedy for pro-

secutorial misconduct; it does not affect the prosecutor directly, but rather imposes upon society the cost of retrying an individual who was fairly convicted.

Judges and commentators have frequently criticized the high social cost and minimal benefits engendered by reversing convictions because of improperly obtained evidence. *See, e.g., California v. Minjares,* 443 U.S. 916, 916-28 (1979) (mem.) (Rehnquist, J., dissenting); *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 415-24 (1971) (Burger, C.J., dissenting); Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665 (1970); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?* 62 Judicature 215 (1978). To impose such a remedy in the present context is even less justifiable. Prosecutorial misconduct that causes no substantial prejudice has, by definition, not resulted in a constitutional deprivation; an illegal seach or seizure, by contrast, perforce violates the Fourth Amendment. Furthermore, prosecutors act under the immediate supervision of trial judges; law-enforcement personnel, on the other hand, act beyond the view of judges, in the homes and on the persons of individuals under investigation. The need for a potent deterrent device is less compelling in the former situation, and the resulting cost to society is less justifiable. Finally, reversal of convictions seems even less likely to be effective in deterring prosecutors than it has been in affecting the conduct of police. The federal prosecutors in this Circuit tend to be relatively young attorneys, seeking valuable experience as a prelude to other professional endeavors; such individuals are unlikely to share the institutional concerns found in career law-enforcement personnel. By contrast, sanctions imposed directly upon young, upwardly mobile prosecutors are likely to evoke strong concern and direct response.[6]

Several recent decisions clearly reflect the Supreme Court's reluctance to overturn convictions based upon il-

legally seized evidence when the outcome of the trial was not unjust. *See, e.g., Michigan v. DeFillippo,* 443 U.S. 31, 38 n.3 (1979); *United States v. Ceccolini,* 435 U.S. 268, 275-76 (1978); *Stone v. Powell,* 428 U.S. 465, 486-89 (1976). Similarly, the Court has disfavored reversal of convictions that were obtained through questionable law enforcement practices, absent a finding that the defendant's constitutional rights were violated and that he was prejudiced thereby. *See, e.g., United States v. Morrison,* 49 U.S.L.W. 4087, 4088-89 (U.S. Jan. 13, 1981) (dismissal of indictment); *United States v. Payner,* 100 S.Ct. 2439, 2445-47 (1980). Recognizing the general inappropriateness of reversal as a sanction for nonprejudicial prosecutorial misconduct is a necessary first step in the task of fashioning remedies that are more appropriate and, hence, more likely to be invoked.

### *A. Role of the Trial Court*

This court has repeatedly stated that the task of ensuring that attorneys conduct themselves pursuant to recognized ethical precepts falls primarily upon district courts. *See, e.g., Lefrak v. Arabian American Oil Co.,* 527 F.2d 1136, 1140 (2d Cir. 1975); *NCK Organization, Ltd. v. Bregman,* 542 F.2d 128, 131 (2d Cir. 1976). The district judge is in an especially well-suited position to control the overall tenor of the trial. He can order the offending statements to cease and can instruct the jury in such a manner as to erase the taint of improper remarks that are made. The ABA Standards For Criminal Justice recognize that "[i]t is the responsibility of the [trial] court to ensure that final argument to the jury is kept within proper, accepted bounds." ABA Standard 3-5.8. The trial judge can interrupt to anticipate and cut off an improper line of argument. Once the offending remarks are made, the judge can strike them and forcefully instruct the jury as to

their inappropriateness. If persuaded in a rare case that irreparable prejudice has occurred, the court retains the option of granting a motion for a mistrial.

Beyond these traditional trial-conduct remedies, the court has a range of remedies that may, in appropriate circumstances, be directed specifically at the attorney. Initially, the court may consider a reprimand, delivered on the spot or deferred until the jury has been excused from the courtroom. Flagrant conduct, in violation of a court order to desist, may warrant contempt penalties. If the conduct has occurred on prior occasions, the court may wish to give serious consideration to a formal reference to the appropriate local grievance committee to assess the need for disciplinary proceedings. Alternatively, persistent misconduct may warrant action by the court itself to initiate proceedings to determine the appropriateness of a suspension from practice before the District Court. We suspect that the message of a single 30-day suspension from practice would be far clearer than the disapproving remarks in a score of appellate opinions.

*B. Authority of the Circuit Court*

The Court of Appeals also has power to fashion remedies directly against an attorney persistently engaging in improper courtroom conduct. *See United States v. Thomas,* 474 F.2d 110, 111-12 (10th Cir.), *cert. denied,* 412 U.S. 932 (1973). A reprimand in a published opinion that names the prosecutor is not without deterrent effect.[7] A Court of Appeals, exercising its supervisory power over the administration of criminal justice,[8] may well have authority to direct the initiation of appropriate action in the District Court or, alternatively, to take action of a disciplinary nature with respect to practice before the federal courts of the Circuit, including possible temporary

suspensions. We need not probe the full extent of such authority at this time.[9] We deem it sufficient to express our concerns and to alert the district courts to their range of remedies, with confidence that the proper discharge of their responsibilities will prove to be a sufficient deterrent.

We do not suggest that the improper summation in this case warranted more than prompt admonishment and curative instructions by the District Court. At the same time we hope to have made it clear that improper summations in the future, especially if done on repeated occasions by the same prosecutor, run the distinct risk of direct sanctions against the attorney. We expect the able attorneys who supervise federal prosecutors throughout this Circuit to renew their efforts to maintain the high level of conduct that has traditionally characterized the office of the United States Attorney.

The judgment of conviction is affirmed.

**FOOTNOTES**

1. Amato called the Modica home twice. The first call was not answered: a woman answered the second call and took a message for appellant to call Amato back. At trial, the prosecutor told the court that a tape recording of that conversation had been made, but was missing. At appellant's request, the jury was read a stipulation that a recording of an Amato telephone conversation had been made but was missing. Appellant did not assert any prejudice or request an additional remedy. Appellant now claims, however, that the missing tape would have supported his theory that Amato framed him. Citing *United States v. Buffalino,* 576 F.2d 446 (2d Cir.), *cert. denied,* 429 U.S. 928 (1978), appellant urges that his conviction be overturned and the indictment dismissed.

Appellant's claim is baseless. He and Amato confirmed each other's accounts of their single conversation on the night of November 15. Appellant adduced no evidence to suggest that the missing recording would have supported his theory of a frameup. Indeed, the record does not indicate that the recording would have been helpful to appellant or that its loss prejudiced him in any way. Moreover, unlike the situation in *Buffalino, id.* at 449, there is no indication here that the missing tape was deliberately destroyed by government agents.

2. 49 U.S.C. §782 provides that any vehicle used in violation of 49 U.S.C. §781 shall be seized and forfeited. Section 781 outlaws using a vehicle to transport contraband articles, defined to include any narcotic drug. Similarly, 21 U.S.C. §881(a) provides that controlled substances, their containers, and vehicles used to transport them "shall be subject to forfeiture to the United States and no property right shall exist in them."

3. Appellant mentions several other purported errors that, taken together, assertedly deprived him of a fair trial. *See* Appellant's Brief at 42-44. These claims are frivolous.

4. Defense counsel objected that the prosecutor's implied that defendant had threatened the witnesses. Although the judge overruled the objection, the prosecutor then explained: "As I was saying, all these Alitalia employees were scared. They were scared to be here, scared to be involved in any criminal matter, scared in general to be in a courtroom, scared to be testifying in a criminal case." Transcript at 1068-69.

5. Although thee were the most significant contradictions of appellant's testimony, they were not the only ones. For example, appellant said that he had gone to the airport alone on the evening of November 12: Miradoli testified that another person had accompanied appellant. Appellant claimed that Amato had told him to go home on the afternoon of November 12 to get his claim checks; Finiello testified that it was he, not Amato, who had requested the claim checks.

6. *But cf. United States v. Freeman, supra,* 514 F.2d at 1321 n.45 ("In this area [reversal for improper prosecution summation], unlike the realm of police misconduct addressed by the fourth amendment exclusionary rule, the burden of reversal falls directly on the one responsible for the misconduct.").

7. We note that appellate courts have generally been reluctant to name the individual prosecutors whose comments have been found improper. Among the many reported decisions of this Court in the last decade, apparently only two identify the prosecutor. One does so obliquely, by quoting the trial judge's statement to him. *United States v. Drummond, supra,* 481 F.2d at 63. The other notes that the pro-

secuting attorney argued the appeal. *United States v. Stahl,* 616 F.2d 30, 32 (2d Cir. 1980). We refrain from naming the prosecutor in this case because his improper remarks, though ill-advised, were not instances of deliberate misconduct.

8. *See United States v. Payner,* 447 U.S. 727, 735 n.7 (1980) (supervisory power "permits federal courts to supervise the administration of criminal justice among the parties before the bar"); *United States v. Jacobs,* 547 F.2d 772, 775-76 (2d Cir.), *cert. dismissed,* 436 U.S. 31 (1976); *United States v. Toscanino,* 500 F.2d 267, 276 (2d Cir. 1974).

9. A separate, potential basis for appellate discipline of attorneys is the courts' duty to enforce ethical standards. Improper statements by federal prosecutors constitute unethical conduct, regardless of whether they justify reversal in a particular case. Inflammatory remarks or personal attestations as to guilt or credibility violate the Code of Professional Responsibility. *See, e.g., United States v. Splain,* 545 F.2d 1131, 1135 (8th Cir. 1976); *Olenin v. Curtin & Johnson, Inc.,* 424 F.2d 769, 769-70 (D.C. Cir. 1970); *United States v. Munford,* 431 F.Supp. 278, 289 (E.D. Pa. 1977); ABA Code of Professional Responsibility, Disciplinary Rule 7-106(C) & Ethical Consideration 7-24. We leave unexamined at this time the limits on this power implicit in our ruling in *Armstrong v. McAlpin,* 625 F.2d 433 (2d Cir. 1980) (*en banc*), vacated on other grounds, 101 S.Ct. 911 (1981).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 30th day of December, one thousand nine hundred and eighty-one

Present: HON. WILLIAM H. TIMBERS
HON. JON O. NEWMAN
*Circuit Judges*
HON. ABRAHAM D. SOFAER
*District Judge*

---

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

GAETANO MODICA,
*Defendant-Appellant.*

---

UNITED STATES COURT OF APPEALS
FILED
DEC 30 1981
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

80-1482

Petitions for rehearing having been filed herein by counsel for the defendant-appellant, Gaetano Modica,

and by counsel for the plaintiff-appellee, United States of America, and the United States Attorney for the Southern District of New York having filed a memorandum as amicus curiae in support of the plaintiff-appellee's petition for rehearing,

Upon consideration thereof, it is

ORDERED that said petitions for rehearing be and they hereby are DENIED.

A. DANIEL FUSARO, Clerk
By: s/ Francis X. Gindhart
Chief Deputy Clerk

## APPENDIX B

### *AMENDMENT VI*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### *AMENDMENT XIV*

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*§841. Prohibited acts A—Unlawful acts*

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

*§846. Attempt and conspiracy*

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

*§881. Forfeitures—Property subject*

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

# Opposition

Office - Supreme Court, U.S.
FILED
MAY 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1630

# In the Supreme Court of the United States

OCTOBER TERM, 1981

GAETANO MODICA, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
*Solicitor General*

D. LOWELL JENSEN
*Assistant Attorney General*

LOUIS M. FISCHER
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

1. Whether comments made by the prosecutor during his closing argument require reversal of petitioner's conviction in view of the overwhelming evidence of his guilt.

2. Whether DEA agents were justified in conducting a warrantless seizure and search of a suitcase located in the trunk of petitioner's car following a "controlled delivery" of the suitcase, which had crossed an international boundary.

## TABLE OF CONTENTS


Page

Opinion below ..... 1

Jurisdiction ..... 1

Statement ..... 1

Argument ..... 5

Conclusion ..... 10


## TABLE OF AUTHORITIES

Cases:


*Burdeau* v. *McDowell*, 256 U.S. 465 ..... 9

*Gibson* v. *United States*, 403 F. 2d 569 ..... 7

*Harris* v. *United States*, 402 F. 2d 656 ..... 7

*Rakas* v. *Illinois*, 439 U.S. 128 ..... 8

*Rawlings* v. *Kentucky*, 448 U.S. 98 ..... 8

*United States* v. *Andrews*, 618 F. 2d 646, cert. denied, 449 U.S. 824 ..... 9

*United States* v. *Battista*, 646 F. 2d 237 ..... 6-7

*United States* v. *Bulgier*, 618 F. 2d 472, cert. denied, 449 U.S. 843 ..... 9

*United States* v. *Cotton*, 631 F. 2d 63, cert. denied, 450 U.S. 1032 ..... 7

*United States* v. *Farnkoff*, 535 F. 2d 661 ..... 7

*United States* v. *Hayward*, 420 F. 2d 142 ..... 8

*United States* v. *Herberman*, 583 F. 2d 222 ..... 7

*United States* v. *Kirkland*, 637 F. 2d 654 ..... 7

Page

Cases—Continued:

*United States* v. *LaSorsa*, 480 F. 2d 522, cert. denied, 414 U.S. 855 ..... 7

*United States* v. *Leeds*, 457 F. 2d 857 ..... 7

*United States* v. *Leon*, 534 F. 2d 667 ..... 7

*United States* v. *Morris*, 568 F. 2d 396 ..... 7

*United States* v. *Murphy*, 374 F. 2d 651, cert. denied, 389 U.S. 836 ..... 7

*United States* v. *Ramsey*, 431 U.S. 606 ..... 9

*United States* v. *Ross*, No. 80-2209 (argued Mar. 1, 1982) ..... 9

*United States* v. *Salazar*, 485 F. 2d 1272, cert. denied, 415 U.S. 985 ..... 7

*United States* v. *Salvucci*, 448 U.S. 83 ..... 8

*United States* v. *Wiley*, 534 F. 2d 659, cert. denied, 425 U.S. 995 ..... 8

*Walter* v. *United States*, 447 U.S. 649 ..... 9

Constitution and statutes:

United States Constitution, Fourth Amendment ..... 9

21 U.S.C. 841(a)(1) ..... 1, 2

21 U.S.C. 846 ..... 1

21 U.S.C. 952(a) ..... 2

21 U.S.C. 960(a)(1) ..... 2

# In the Supreme Court of the United States

OCTOBER TERM, 1981

---

No. 81-1630

GAETANO MODICA, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 663 F. 2d 1173.

### JURISDICTION

The judgment of the court of appeals was entered on October 30, 1981. Petitions for rehearing were denied on December 30, 1981 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on March 1, 1982 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of attempting to possess five kilograms of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846, and on one count of possessing 30

grams of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to concurrent terms of 10 years' imprisonment on each count, to be followed by a 15-year special parole term (Pet. App. 6a). The court of appeals affirmed (Pet. App. 1a-27a).

1. The government's evidence at trial showed that petitioner participated in a scheme to smuggle heroin into this country through Kennedy International Airport in New York. On October 22, 1979, a soft-sided, brown, zippered suitcase arrived at the airport on an Alitalia Airlines flight from Rome. The suitcase bore neither personal identification nor a baggage claim check; its only identifying feature was the brandmark "Airway." No one claimed the bag, and the next day an Alitalia employee presented it for Customs inspection. After the bag passed a cursory inspection, it was placed in Alitalia's lost-and-found room. Later that same day, an Alitalia employee opened the suitcase in an attempt to discover its owner. When the employee found two plastic bags in the suitcase that he correctly believed contained heroin, he and two other Alitalia employees returned the bag to a Customs inspector. A search by the Customs inspector revealed three additional bags of heroin. In all, the suitcase contained five kilograms of heroin, with a wholesale value of $1.4 million (Pet. App. 2a-3a).

On November 12, petitioner came to the airport, where he contacted Joseph Amato, an Alitalia employee. Petitioner gave Amato a note, written in Italian, from another Alitalia employee who apparently was stationed in Palermo, Italy. The note requested Amato to assist its bearer. Petitioner then told Amato that he had lost a suitcase on the

---

[1]The jury acquitted petitioner on a third count, which had charged him with importing five kilograms of heroin into the United States, in violation of 21 U.S.C. 952(a) and 960(a)(1). Pet. App. 6a.

previous day's Alitalia flight from Rome. Amato took petitioner to the lost-and-found room, but the attendant there advised them that petitioner would have to produce his baggage claim check (Pet. App. 3a-4a).

That same evening, petitioner and Amato returned to the lost-and-found room. Petitioner brought four baggage claim checks; one bag matching the checks was located. After petitioner signed for that bag, he and Amato left the room, only to return a short time later. This time Amato asked the Alitalia attendant—Miradoli—to help petitioner with another problem. Amato then left the room, and petitioner told Miradoli that he was looking for a bag that his aunt had brought on an October 22 Alitalia flight, but had been too ill to claim. Petitioner described the bag as a brown, soft-sided, zippered suitcase. After checking the baggage record, Miradoli mistakenly informed petitioner that the bag he described had been returned to Rome. Later that day, Miradoli rechecked the records and realized that the bag that petitioner was looking for was the suitcase that contained the heroin (Pet. App. 4a).

On November 15, petitioner visited Amato at a travel agency for which Amato "moonlighted" and again sought his help in recovering the brown suitcase. Petitioner handed Amato a note with "RWUY" written on it to identify the brandmark on the suitcase; Amato correctly interpreted the letters to be a phonetic rendering of "Airway." Petitioner told Amato that the bag contained something valuable and that someone might be in trouble if the bag were not located. He also gave Amato his home telephone number (Pet. App. 4a-5a).

When Amato arrived at work at the Alitalia terminal later that day, DEA agents interviewed him concerning the suitcase containing heroin. After Amato told the agents about his conversation with petitioner, they directed him to

telephone petitioner and tell him that his suitcase had been found. Pursuant to Amato's call, petitioner came to pick up the suitcase that evening. Amato led petitioner to a hallway in which DEA agents had assembled several suitcases. Petitioner selected the October 22 bag and left the airport with it.[2] Surveilling agents followed petitioner to a restaurant and then to his home, where they arrested him and seized the suitcase from the trunk of his car (Pet. App. 5a).

2. During his closing argument, while commenting on Amato's credibility, the prosecutor initially used the rhetorical phrase "I suggest that" to argue for the veracity of certain of Amato's statements (*id.* at 10a). Later in his summation, however, he went beyond that phrase and instead stated to the jury, "I'm here to tell you [that Amato's testimony is truthful]" (Pet. App. 10a). The court of appeals deemed this comment improper (*id.* at 10a-12a). The court also found fault with the prosecutor's suggestions that several witnesses, including Amato, were scared, and that their fearfulness was attributable to an unknown third person who had accompanied petitioner to the airport when he claimed the luggage in question (*id.* at 12a-13a). Finally, the court disapproved of the prosecutor's closing admonition to the jury—"Don't let [petitioner] walk out of this room laughing at you" (*id.* at 13a-15a).[3]

Although it found these comments improper, the court of appeals held that the remarks did not substantially prejudice petitioner, and, accordingly, it declined to reverse his

---

[2]DEA agents had substituted white powder for the original five kilograms of heroin in the bag. Only an exemplar of some 30 grams of heroin was left in the suitcase when petitioner took it (Tr. 47, 107, 585). (References to the transcript of the suppression hearing and trial are taken from the government's brief in the court of appeals.)

[3]The court of appeals also noted with disapproval the prosecutor's "excessive use of the personal pronoun 'I'" (Pet. App. 15a).

conviction (Pet. App. 16a-18a). The court noted that the offending remarks were confined to the summation and that at no time throughout the six-day trial had the prosecutor disregarded any rulings by the trial court (*id.* at 17a). The court concluded (*ibid.*) that

> the jury would have convicted [petitioner] even if the improper statements had not been made. The case against [petitioner] was overwhelming; he was caught red-handed, and his explanation was implausible and refuted.

See Pet. App. 17a-18a.[4]

**ARGUMENT**

1. Petitioner contends (Pet. 10-20) that the prosecutor's closing argument warranted reversal of his conviction. Petitioner concedes (*id.* at 10-11), however, that reversal is warranted only if he was substantially prejudiced by the prosecutor's comments. Petitioner also concedes (*id.* at 11) that the court of appeals applied the proper legal standard in determining whether he suffered substantial prejudice from the errors in summation; his quarrel is only with the court's negative answer to that question (*ibid.*). Accordingly, the decision below involves nothing more than the application of settled law to a particular set of facts. Further review by this Court is therefore unnecessary.

The court of appeals recognized (Pet. App. 16a), and petitioner agrees (Pet. 11), that a determination of whether the summation here resulted in substantial prejudice to petitioner turns on three factors: (a) the severity of the

---

[4]The court also suggested sanctions other than reversal that could be imposed against attorneys who engage in improper trial conduct (Pet. App. 19a-25a). It held (*id.* at 25a), however, that no "more than prompt admonishment and curative instructions by the District Court" was warranted in this case. See also *id.* at 27a n.7.

misconduct; (b) the measures adopted to cure the misconduct; and (c) the certainty of conviction in the absence of the improper statements. Applying these factors to the prosecutor's closing argument, the court of appeals held that substantial prejudice was not present. With respect to the first factor—the severity of the misconduct—the court found that the prosecutor's improper comments were confined to his summation and that his conduct during the rest of the trial had been "free of improper remarks" (Pet. App. 17a). Moreover, the court noted that the prosecutor voluntarily corrected one of his objectionable comments—concerning Amato's "fear" about testifying—immediately after the trial court had overruled the objection to his initial comment (*id.* at 12a, 17a, 26a n.4).

Although the trial court failed to sustain objections to the comments,[5] the court of appeals properly did not consider that fact sufficient to justify reversal, particularly in light of its conclusion concerning the third factor, the "overwhelming" nature of the government's case (*id.* at 17a-18a). As the court noted (*ibid.*), several witnesses other than Amato flatly contradicted petitioner's attempts to portray himself as an innocent bystander who had been framed by Amato. For example, these witnesses testified that petitioner himself had sought the October 22 suitcase and, on his own, had immediately picked it out of the DEA luggage lineup on the night of November 12, thus contradicting petitioner's claim that he was a dupe of Amato (*id.* at 18a). In view of the strength of the government's case and the inherent incredibility of petitioner's claims (*ibid.*), the court below properly determined that the prosecutor's comments did not justify reversal of petitioner's conviction. See *United States* v.

---

[5]Shortly after the prosecutor's rebuttal closing, however, the trial court did instruct the jury that arguments of counsel are not evidence (Pet. App. 17a; Tr. 1169).

*Battista*, 646 F. 2d 237, 244 (6th Cir. 1981); *United States* v. *Kirkland*, 637 F. 2d 654, 656 (9th Cir. 1980); *United States* v. *Cotton*, 631 F. 2d 63, 66 (5th Cir. 1980), cert. denied, 450 U.S. 1032 (1981).[6]

---

[6]In most of the cases on which petitioner relies, the courts held either that no prosecutorial misconduct had occurred or, regardless of the occurrence of such misconduct, that reversal was not warranted. See *United States* v. *Morris*, 568 F. 2d 396, 402 (5th Cir. 1978); *United States* v. *Farnkoff*, 535 F. 2d 661, 668 (1st Cir. 1976); *United States* v. *Salazar*, 485 F. 2d 1272, 1280 (2d Cir. 1973), cert. denied, 415 U.S. 985 (1974); *United States* v. *LaSorsa*, 480 F. 2d 522, 526 (2d Cir.), cert. denied, 414 U.S. 855 (1973); *United States* v. *Leeds*, 457 F. 2d 857, 861 (2d Cir. 1972); *Gibson* v. *United States*, 403 F. 2d 569, 570 n.1 (D.C. Cir. 1961); *Harris* v. *United States*, 402 F. 2d 656, 657 (D.C. Cir. 1968); *United States* v. *Murphy*, 374 F. 2d 651 (2d Cir.), cert. denied, 389 U.S. 836 (1967). See also *United States* v. *Leon*, 534 F. 2d 667, 678 n.11 (6th Cir. 1976).

Moreover, in *United States* v. *Morris*, *supra*, the prosecutor had improperly argued that government officers had no interest in the case other than to uphold the law (568 F. 2d at 400). No similar statement was made here. Further, contrary to petitioner's assertion (Pet. 15), the *Morris* court found (568 F. 2d at 403) that the prosecutor had *not* erred when he rhetorically asked the jury (568 F. 2d at 400 n.1) "[w]hat benefit is there in a guilty person getting off?" Such a question is not unlike the prosecutor's remark here not to let petitioner walk out of the room laughing. In *United States* v. *Farnkoff*, *supra*, the prosecutor " 'suggest[ed]' " to the jury that it " 'come to the decision which I think you should come to, based upon the evidence, that the defendant is guilty as charged' " (535 F. 2d at 668). The court there held that a cautionary instruction cured any error of the prosecutor's injection of his personal opinion of the defendant's guilt (*ibid.*). Here, however, the prosecutor did not expressly state any such opinion.

Finally, in the remaining cases on which petitioner relies, the basis for reversal was something other (or more) than error in the government's closing argument. In *United States* v. *Herberman*, 583 F. 2d 222, 231 (5th Cir. 1978), the conviction was reversed because of the *combination* of several instances of prosecutorial misconduct, including wrongful withholding of *Brady* material, the prosecutor's unfounded comment, made during summation, that certain subpoenaed witnesses " 'mysteriously * * * weren't around, couldn't be found' " (*id.* at 230 & n.14), the government's erroneous assertion that tapes requested by the defense had been destroyed, prosecution evidence of crimes that were not

2. Petitioner also contends (Pet. 21-25) that the October 22 suitcase, containing the exemplar of heroin, was improperly seized from the trunk of his car following his arrest. There is no merit to this claim.

On October 23, 1979, an Alitalia employee discovered heroin in a suitcase that had arrived on the previous day's flight from Rome and had not been claimed. He delivered the bag to a Customs agent, who discovered a total of five kilograms of heroin inside it (Pet. App. 3a). Customs officers then gave the bag to DEA agents, who removed all but 30 grams of the heroin. On November 15, petitioner picked up the bag at the airport and, under constant DEA surveillance, eventually returned to his home. There he was arrested and the bag was seized from the trunk of his car (*id.* at 5a-6a).

We note at the outset that petitioner consistently has maintained that the suitcase is not his but rather belongs to Amato (Pet. App. 8a). Since petitioner has expressly disclaimed any interest in the bag, he has failed to establish any expectation of privacy in it. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980); *United States* v. *Salvucci*, 448 U.S. 83, 91-92 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 148 (1978).

---

charged, and an allegedly false statement by the prosecution that one of its witnesses had not been granted immunity, "[e]ven though any single instance [of prosecutorial misconduct] might not have resulted in a reversal" (*id.* at 231). See also *United States* v. *Wiley*, 534 F. 2d 659, 665 (6th Cir.), cert. denied, 425 U.S. 995 (1976) (conviction reversed because of questioning by the prosecutor that implied that the defendant was involved in other crimes); *United States* v. *Hayward*, 420 F. 2d 142, 144-146 (D.C. Cir. 1969) (conviction reversed because of trial court's instruction that had the effect of directing a verdict against the defendant).

Moreover, petitioner does not—nor could he—challenge the propriety of the initial discovery of the heroin by the airline employee; it is well settled that a search or seizure by a private party, even if wrongful, does not violate the Fourth Amendment and that the government is not prohibited from using as evidence the fruits of such a search or seizure that it has rightfully acquired. See *Walter* v. *United States*, 447 U.S. 649, 656 (1980) (opinion of Stevens, J.); *Burdeau* v. *McDowell*, 256 U.S. 465 (1921). The Customs agent's subsequent search was fully justified because the suitcase clearly had crossed the international border and had not yet entered the stream of domestic commerce. *United States* v. *Ramsey*, 431 U.S. 606, 616-619 (1977). As a result of that search, DEA agents knew there was heroin in the suitcase. After petitioner picked up the bag, the agents confirmed through their constant surveillance that the bag was not tampered with prior to its seizure from the trunk of petitioner's car. Under these circumstances, the agents knew to a physical certainty that the suitcase contained contraband. This "controlled delivery" justified the warrantless seizure and search of the bag following petitioner's arrest, which entailed no incremental invasion of petitioner's privacy beyond what had already lawfully taken place. See *United States* v. *Bulgier*, 618 F. 2d 472, 476-478 (7th Cir.), cert. denied, 449 U.S. 843 (1980); *United States* v. *Andrews*, 618 F. 2d 646 (10th Cir.), cert. denied, 449 U.S. 824 (1980).[7]

---

[7]In view of these considerations, there is no need to hold this case pending the decision in *United States* v. *Ross*, No. 80-2209 (argued Mar. 1, 1982), which involves the propriety of a warrantless search of a paper bag found in the trunk of a car.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

D. LOWELL JENSEN
*Assistant Attorney General*

LOUIS M. FISCHER
*Attorney*

MAY 1982

DOJ-1982-05